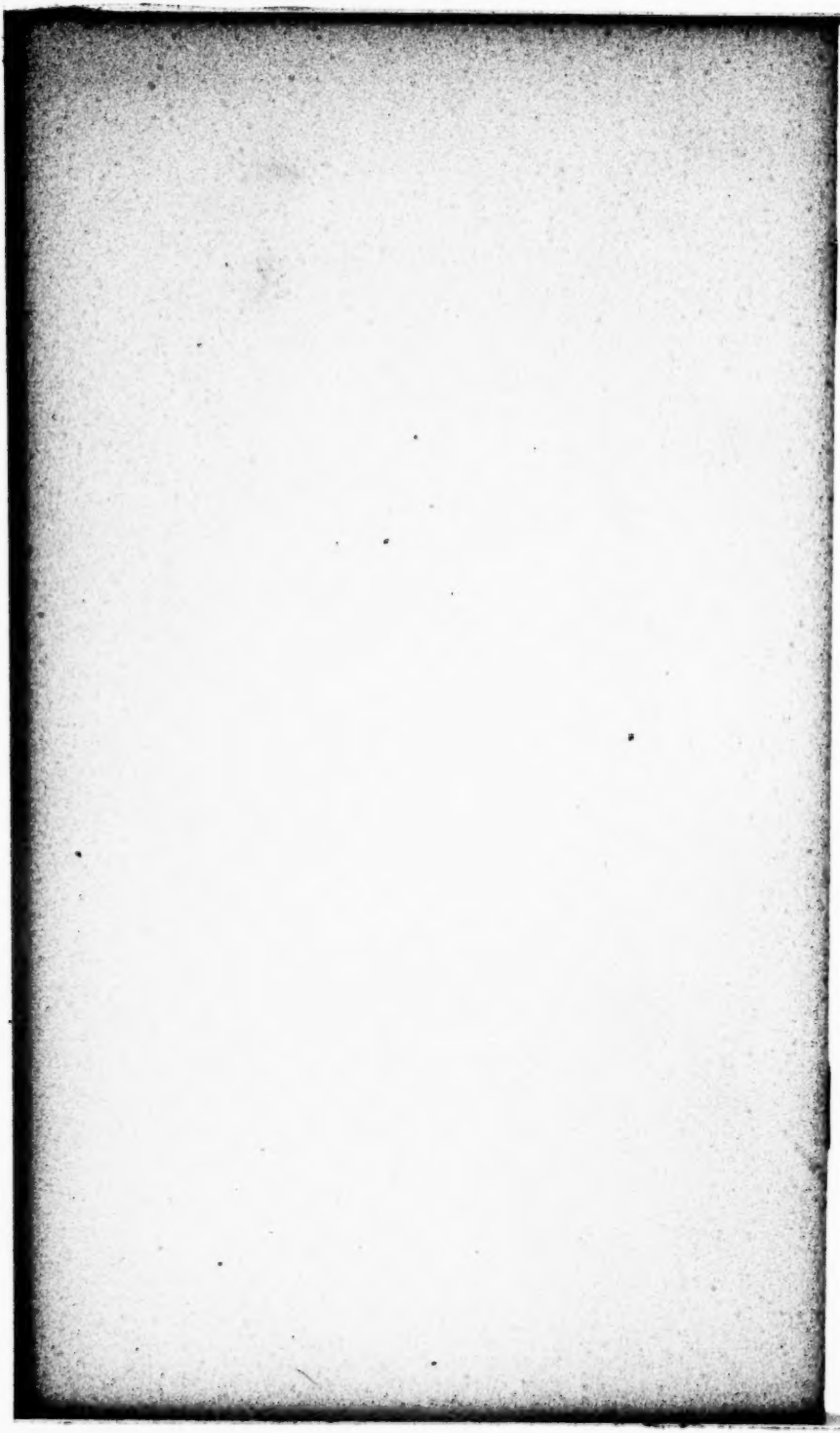

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-879

CALIFORNIA INDEPENDENT TELEPHONE ASSOCIATION, GENERAL TELEPHONE COMPANY OF CALIFORNIA, and CONTINENTAL TELEPHONE COMPANY OF CALIFORNIA,

Petitioners,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, VERNON STURGEON, WILLIAM SYMONS, JR., J. P. VUKASIN, JR., THOMAS MORAN, and D. W. HOLMES, the members of said Public Utilities Commission,

Respondents.

BRIEF FOR PETITIONERS IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

(Dated: January 17, 1974)

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The Brief for Respondents in Opposition mistakenly asserts that resolution of the present controversy involving the independent telephone industry of California turns on a fact situation which is unique and unlikely to recur (Brief in Opp., 2, 9-10). The practice of providing for adoption by independent telephone companies of rates fixed for Bell System companies in some categories of service is by no means unique to California but is followed in numerous other states and also by the Federal Communications Com-

mission in fixing interstate toll rates.* It thus affects hundreds of independent telephone companies large and small.**

Moreover, the constitutional question presented (Pet., 2) is not limited to situations involving adopted rates but is of more general importance. The constitutional prohibition against retroactive rate-making comes into play in any case in which a utility is required to refund revenues previously collected under unconditional commission-prescribed tariffs. Respondents' statement of the question presented (Brief in Opp., 2) omits reference to the fact that in the present case there was no stay or impoundment provision except as to Pacific, the Bell System company. Respondents' own quotation from the partial stay order issued by the Supreme Court of California (Brief in Opp., 3) shows that the stay order applied only to "sums collected by Pacific." Respondents resort to the argument (Brief in Opp., 8) that the stay order should nevertheless be construed as applying to the independent companies even though they were not named in it and were not even parties to the proceeding in which it was issued. To accept

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* *See, e.g., Telephone Toll Rates and I-I Toll Settlements,* 87 P.U.R.3d 443, 444 (Fla. Pub. Serv. Comm'n 1971); *Indiana Bell Tel. Co.,* No. 32278 (Pub. Serv. Comm'n of Ind., Apr. 9, 1970), *digested in* Vol.D P.U.R. Dig.2d § 582 (Supp. 1968-72); *General Tel. Co. of Upstate N.Y.,* 90 P.U.R.3d 30, 37 (N.Y. Pub. Serv. Comm'n 1971); *Intrastate Tel. Toll Rates,* 67 P.U.R.(n.s.) 63 (N.C. Util. Comm'n 1947); *General Tel. Co. of Ohio,* 88 P.U.R.3d 216, 220-221 (Ohio Pub. Util. Comm'n 1971); *Inter Mountain Tel. Co.,* 19 P.U.R.3d 109, 110-111 (Tenn. Pub. Serv. Comm'n 1957); *State Tel. Co. of Wis.* 1928A P.U.R. 249, 253-54 (Wis. R.R. Comm'n); 47 C.F.R. §§ 61.135-.136 (1972). *See also,* National Ass'n of Reg. Util. Comm'rs, *A Compilation of Long Distance Tel. Rates for Two-Point Serv. of the Bell System* 6 (1972).

** In California these companies range in gross annual revenues from $20,000 to $500,000,000 (Pet. App., 150a).

this argument would necessitate reading into the stay order of the California Supreme Court the imposition of a refund requirement on Petitioners without their having been afforded notice and an opportunity to be heard—a clear violation of due process.

Respondents argue that the adopted rates of the independents are not fixed in relation to their own revenues since the Commission requires them to adopt rates fixed for Pacific on the basis of Pacific's revenues. Even if true, it is difficult to perceive the relevance of this to the constitutionality of retroactive reclamation of revenues collected under final commission-prescribed rates. Regardless of the procedure by which the rates were fixed, the confiscation of revenues collected under those rates without any stay or provision for impoundment is unconstitutional.

Respondents concede that the Commission did rely upon the revenues to be derived from the adopted rates in setting local exchange rates for petitioner General Telephone Company of California (Brief in Opp., 8). Despite this they argue that the local exchange rates were not before the Commission when the adopted rates were authorized, or before the Court below when Pacific's rate increase was annulled, and are therefore not properly before this Court (Brief in Opp., 8-9). This misses the point of Petitioners' argument (Pet., 12-13). The constitutional defect does not lie in the local exchange rates themselves. It lies rather in the retroactive taking of revenues upon which the Commission by its own admission relied in setting the local exchange rates. This is an argument which was indeed raised below (Pet. App., 117a-19a).

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition, a writ of certiorari should issue.

Dated: January 17, 1974

Respectfully submitted,

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